three years from the incurring of the liability.[3] The meaning of this dictum is very indefinite.

In *Johnson v. Hinkle*[4] it was held by the District Court of Appeal that the statute ran from the date of removal of certain fixtures in violation of the terms of a lease of oil lands. The action was for breach of the contract contained in the lease, and it was therefore argued that Hunt v. Ward[5] applied and that the statute ran from the date of the contract. Treated as an action for breach of contract the reasoning of the defence would appear unanswerable. But under the California rule the court will look at the facts stated in the complaint to determine the true nature of the action, whether in tort or on contract, and having determined this will apply the proper rules as to measure of damages and statutes of limitation.[6] The facts stated show a conversion of the casing by its removal from the land contrary to the terms of the contract. This creates a "liability" at the time of that act for which the stockholders are liable under the broad provision "liabilities incurred."[7] Hence the decision of the court as to the statute of limitations would appear to be correct in its result. The court, while ostensibly applying the measure of damages for breach of contract,[8] concluded that the plaintiff was only entitled to the value of the casing after removal, in the absence of any showing that the land was useful for or intended to be used for oil purposes, saying that that was the only detriment proximately caused by the breach. It would have been better in this case to have expressly treated the action as based on a tort liability. Otherwise the language of the court may tend to throw confusion on the rule of Hunt v. Ward, which rightly or wrongly, has settled the rule in this state.

J. S. M., Jr.

DAMAGES: MEASURE OF DAMAGES IN CONVERSION OF MINING STOCK.—It is the general rule of damages for conversion that when the thing converted has a fixed value, recovery is limited to that amount with interest from the time of the conversion. This rule is embodied in the Civil Code of California,[1] which further provides that "Where the action has been prosecuted with reasonable diligence the highest market value of the property at any time

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[3] Beatty, C. J., in Cook v. Ceas (1904), 143 Cal. 221, 223, 77 Pac. 65.

[4] (Nov. 30, 1915), 21 Cal. App. Dec. 764. Rehearing denied by Supreme Court Jan. 28, 1916.

[5] (1893), 99 Cal. 612, 34 Pac. 235, 37 Am. St. Rep. 87.

[6] Basler v. Sacramento etc. Ry. Co. (1913), 166 Cal. 33, 134 Pac. 993. See also Jones v. S. S. Cortes (1861), 17 Cal. 487, 79 Am. Dec. 142.

[7] In re Putnam (1911), 193 Fed. 464; Lattin v. Gillette (1892), 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Miller & Lux v. Kern County Land Co. (1901), 134 Cal. 586, 66 Pac. 856; ante, p. 243.

[8] Cal. Civ. Code, § 3300.

[1] Cal. Civ. Code, § 3336.

between the conversion and the verdict without interest at the option of the injured party" may be recovered.

The case of *Potts v. Paxton*[2] allowed the recovery of this highest intermediate value in a suit for the conversion of mining stock. The plaintiff was not required to plead the exercise of his option to demand the highest market value, but it was held sufficient that it be announced in any way, even by oral declaration in open court. By this and former California[3] decisions, it would seem to be the settled law in this state that the highest intermediate value rule is applicable to mining stocks, and that its application is not limited or qualified by the subsequent code provisions[4] requiring damages in all cases to be reasonable.

It is the purpose of this note to point out the hardship and injustice of the measure of damages in such cases under our statute. In civil actions the law seeks to indemnify the party for the wrong done him and no more, and it is immaterial whether the complaint sounds in contract or tort. The present rule was originally an exception to the general rule stated in the first paragraph,[5] and was developed because it was felt that for conversion of articles of fluctuating value the general rule did not do full justice. The objections to the highest intermediate value rule have been well considered and settled by the New York courts. Their conclusions are well stated in the leading case of Baker v. Drake.[6] In that case it is shown how this rule gives to the plaintiff an unreasonable advantage over the defendant, by giving the owner profits which it is practically certain would not have realized had he retained the stock. To allow the owner to recover the highest price to which the stock goes, until the time of verdict, permits him to speculate for an unreasonably long time at the expense of the converter. The idea of just compensation which should govern the measure of damages is departed from by this rule. The defendant can only be held for the peak price upon the unreasonable presumption that the owner would have carried the stock through all its fluctuations until it reached its highest point, and then have sold immediately, thus avoiding loss by any subsequent decline in price. To suppose one invariably capable of such action is to attribute to him super-

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[2] (Dec. 15, 1915), 50 Cal. Dec. 645, 153 Pac. 957.

[3] Douglass v. Kraft (1858), 9 Cal. 562; Hamer v. Hathaway (1867), 33 Cal. 117; Tulley v. Tranor (1878), 53 Cal. 274; Dent v. Holbrook (1880), 54 Cal. 145; Fromm v. Sierra Nevada S. M. Co. (1882), 61 Cal. 629.

[4] Cal. Civ. Code, §§ 3358, 3359.

[5] Page v. Fowler (1870), 39 Cal. 412, 2 Am. Rep. 462.

[6] Baker v. Drake (1873), 53 N. Y. 211, 66 N. Y. 518; Gruman v. Smith (1880), 81 N. Y. 25; Wright v. Bank of Metropolis (1888), 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356; Minor v. Beveridge (1894), 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804.

natural shrewdness. The owner in all human probability would never have so successfully conducted his speculation.

The application of the rule where mining stock has been converted is peculiarly unjust. The objections apply with more force in such cases because of its habitual instability in value. All stocks vary in value at different times, but mining stocks fluctuate consistently. While there is usually some legitimate reason for the changes in the value of industrials, unfounded rumor is likely to work up or destroy a market for mining stocks.

The rule which allows only the recovery for the highest price which the stock attains between the time of conversion and a reasonable time thereafter, upon the whole appears more equitable and just than that which allows the highest price to the date of verdict. Besides its reasonableness, the rule has the support of the Supreme Court of the United States.[7] The injustice which results from applying the rule illustrated in the principal case, particularly where mining stock is involved, suggests the propriety of an amendment of the section of the code above cited. The courts are bound by the statute now in force.

C. A. B., Jr.

EMINENT DOMAIN: DAMAGES: BUSINESS.—The Constitution of the State of California[1] provides that private property shall not be taken or damaged for public use without just compensation; and the Civil Code[2] of the same state defines eminent domain as being the right of the people or government to take private property for public use. In view of the constitutional provision and enactment of the legislature, should the owner be compensated for injuries to his business when his land is taken by eminent domain? In the case of *Oakland v. Pacific Coast Lumber & Mill Company*,[3] the Supreme Court of California, speaking through Mr. Justice Henshaw, said, "It is quite within the power of the legislature to declare that a damage to that form of property known as business, or the good will of a business, shall be compensated for, but unless the constitution or legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is damnum absque injuria and does not form an element of the compensatory damages to be awarded." The court followed a well beaten path of decisions both in California and in other jurisdictions,[4] for it has been almost universally held that business is not property which must be paid for in the exercise of the power of eminent domain.

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[7] Galigher v. Jones (1888), 129 U. S. 193, 32 L. Ed. 658, 9 Sup. Ct. Rep. 335; McKinly v. Williams (1896), 74 Fed. 94.

[1] Art. i, § 14.

[2] Cal. Civ. Code, § 1237.

[3] (Dec. 6, 1915), 50 Cal. Dec. 547, 153 Pac. 705.

[4] Robbins v. City of Scranton (1907), 217 Pa. 577, 66 Atl. 977; Henderson v. City of Lexington (1908), 33 Ky. 703, 111 S. W. 318;